

No. 15-15777

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN THAT LUONG,

Defendant-Appellant.

**MOTION TO WITHDRAW AS APPOINTED COUNSEL,
FOR APPOINTMENT OF SUBSTITUTE COUNSEL, AND TO RESET
SCHEDULE TO FILE APPLICATION FOR CERTIFICATE OF
APPEALABILITY; DECLARATION OF COUNSEL IN SUPPORT**

Appeal from the United States District Court
for the Northern District of California
The Honorable Jeffrey S. White
United States District Judge
Nos. 12 Cv. 5039 JSW & 96 Cr. 94 JSW

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Attorneys for Defendant/Appellant
JOHN THAT LUONG

Pursuant to Ninth Circuit Rule 4-1(c)(3), undersigned counsel hereby moves to be relieved as appointed counsel and for the appointment of substitute counsel on behalf of Appellant John That Luong. The good cause for this motion is set forth in the attached declaration of counsel.

Mr. Luong, through undersigned counsel, previously obtained an extension of time pursuant to Federal Rules of Appellate Procedure 22 and 27, and Ninth Circuit Rule 22-1, to file his application for a certificate of appealability (“COA”) on or before May 22, 2015. ECF No. 4. Based on this motion, Mr. Luong requests the Court to reset the schedule, or in the alternative, provide an additional 30 days for new counsel to prepare and file an application for a certificate of appealability.

Mr. Luong is serving a custodial sentence of 65 years.

Respectfully submitted,

Dated: May 12, 2015

COLEMAN, BALOGH & SCOTT LLP

/s/ E A Balogh

ETHAN A. BALOGH

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Attorneys for Defendant/Appellant

JOHN THAT LUONG

DECLARATION OF ETHAN A. BALOGH

1. I am an attorney admitted to practice before this Court and am counsel to Appellant John That Luong. Except where otherwise expressly noted, I make this declaration on personal knowledge, and if called as a witness could testify competently to the facts set forth herein. Considering the subject matter of this motion, I present only the facts necessary to support this motion and otherwise remain circumspect.

2. This appeal arises out of the district court's March 18, 2015 entry of judgment denying Mr. Luong's motion under 28 U.S.C. § 2255, his motion for discovery, and a COA. District Court Clerk's Record ("CR") 2151-52. The underlying criminal case involved complex allegations of substantive RICO, RICO conspiracy, Hobbs Act conspiracy, Hobbs Act robbery, use of a firearm during and in relation to a crime of violence, conspiracy to distribute heroin, heroin distribution, and a "phone count." Mr. Luong sustained convictions after an approximately four month jury trial. On direct appeal, this Court affirmed Mr. Luong's convictions but remanded for resentencing. Following resentencing, this Court affirmed, and these section 2255 proceedings followed.

3. As noted, the district court denied a COA on March 18, 2015. Under Ninth Circuit Rule 22-1(d), the 35-day deadline for Mr. Luong to move this Court

for a COA was to expire on April 22, 2015. I previously moved for, and this Court granted, my request for a 30-day extension of time to permit me until May 22, 2015 to prepare and file Mr. Luong's request for a COA. Docket No. 4.

4. Following that motion, I conferred with my client about the case and believed we had an agreed upon action plan regarding the application for a COA and the prosecution of this appeal. Despite those discussions, my client thereafter prepared and filed a number of pro se pleadings, each of which was rejected by the Court. *See* Docket Nos. 5-7. I addressed these issues with my client in writing and we had the opportunity to speak this week. My client informed me that he now disagreed with the strategy we pursued in the district court and asked me to withdraw as his counsel. Based on the nature of our disagreement, I concur that Mr. Luong will be better served if new counsel is appointed to represent him on appeal.

5. To accommodate new counsel and his or her concomitant need to get up to speed on this matter, and to protect Mr. Luong's rights, I also respectfully ask the Court to reset the briefing schedule with respect to the due date for Mr. Luong's application for a COA. Because counsel is obligated to represent Mr. Luong on this appeal until this Court issues an Order granting counsel leave to withdraw, *see* 9th Cir. R. 4-1(a), undersigned counsel will file timely the

application for a COA on or before the scheduled date if this motion is not granted before that date.

6. For these reasons, I respectfully request the Court to enter an Order relieving me as appointed counsel, and appointing substitute counsel on behalf of Mr. Luong.

Under penalty of perjury of the laws of the United States, I declare the foregoing is true and correct.

Dated: May 12, 2015

/s/ E A Balogh
ETHAN A. BALOGH

PROOF OF SERVICE

I, Ethan A. Balogh, certify that on May 12, 2015, I filed electronically one copy of the foregoing pleading with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, and that all parties to whom I am required to provide service are registered CM/ECF users, and that service of the pleading shall be accomplished by the CM/ECF system.

I further certify that I have served, via United States Mail, one copy of the foregoing pleading to Mr. Luong at the following postal address:

JOHN THAT LUONG
Register No. 08838-097
U.S.P. - Canaan
P.O. Box 300
Waymart, PA 18472

Dated: May 12, 2015

/s/ E A Balogh
ETHAN A. BALOGH